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1948.

File No. O. stamps
48

Legal **DEPARTMENT**

A **BRANCH**

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K.S.R.
8/6

Subject :—

O. stamps

Opinions under the

Indian Stamp Act, 1899.

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Std. Sectt. Slip 24 B a.

57-A

C O N T E N T S.

Legal Department File No. O.Stamps /48.

Sr. No.	R.I. /O. No.	Subject.	Pages.
		Opinions under the Indian Stamp Act, 1899.	
1	666 17-1-48	G.of I. Ministry of Finance (Revenue Division) letter C, No.39-Stamps/46 dated 26-12-47 Re: Affidavit filed by heir to the deceased for purposes of ~~the~~securing continuity of appeal regarding payment of pension-liability to stamp duty item 4(c) of sch.I to the Indian Stamp Act, 1899.	1-2
2	4015 19-4-47 (U.R. to Adv.Genl.) 1002 27-1-48 (AdvX.Genl's opinion No. 11dt.20-1-48) 959 28-1-48	Question whether argument entered into by two parties in respect of transaction of finance requires to be stamped under the Stm	3-14
3	1028 30-1-48 1635 10-2-48 (Adv. Genl'sNo.13 dt./ 9-2-48) 1546 13-2-48	Re: Agency Agreements- security-deposits-cost and marketable security. Questions regarding charging stamp duty on ---	15-20
4	1884 25-2-48	Re: Adjudication of stamp duty on a Memorandum sent by a Broker to his principal.	21-22
	4143 29-4-48	Question whether in the interest of the Govt. revenue it is desirable to direct all collectors and the supdt. of stamps to grant refund for spoiled or misused stamps in accordance with sec.53(c) in a all cases where stamps received in refund under sec.53(a) or(b) in respect of one document are likely to be used for stamping another document parties to which are different.	23-24
6	6482 10-7-48	Re: Letters to indemnity for obtaining duplicate copies of lost shares, securities Insurance Policies etc. charging with stamp duty of Rs.1-8-0 under Arts.5(c) of the Act. Proposal of Govt. to issue a Press Note for public information staging that the letters of indemnity mentioned above should bear a stamp of only Rs. 1-8-0 and not more. Question whether the proposed Press Note should at all be issued.	25-32

1	2	3	4
7	8164 25-8-48	Re: Document executed on non-~~Indian~~ judicial general stamp of Rs. 682-8-0 recording a non-testamentary disposition of immoveable property worth Rs. 20,000/- Questions (1) Whether the document is a declaration of trust or a settlement 2) If it is a "Settlement" whether it is chargeable under Art. 58 A(1) or58(ii) of the Sch. to the Act.	33-34
8	6238 3-7-48 (U.O.R.to Adv.Gen.) 10945 31-8-48 (Adv.Genl's No.38dt. 30-8-48) 8435 2-9-48	Re: Prosecution of the Alembic Chemical Works for understamping the indenture of floating charge executed by the Alembic distributers on its undertaking and all its present & future properties in favour of them for Rs. 10,00,000.	35-44
9	10147 29-10-48	Re: instrument executed by a member of ~~Hindu~~ joint Hindu family by himself and on behalf of his two minor children in favour of the remaining members of the family agreeing to relinquish his claim over the joint immoveable and moveable property and in lieu thereof receive moveable worth Rs. 9000/- and Rs. 10,000/- cash. Question whether the document is an instrument of partition or release.	45-46
10	14210 26-10-48	G.R.R.D.No. 4298/33 dt. 18-10-48 RE: Stamp Duty: Duplicate scrips of stock and shares of an incorporated Company. Remission of- on indemnity bonds executed for obtaining.	47-48
11	10150 29-10-48	Question whether the duty under the stamp Act is an the instrument or on the bransaction.	49-52
13	10753 16-11-48	Re: stamp duty on declaration made before the Distt. Magistrate. Art. 4 Sch. I of the Act. (PL. see R.L.A.'s No.2449/3-3-49) O.Stamps/49	57-62
12	11356 10-9-48	G.R.R.D.No. 8450/45dt.14-8-48 Re: Stamp Duty Agreement. on certain Indian Stamp Act, 1899.	53056
14	12393 29-10-48	Re: Hypothecation deed between the Hind Bank & the International Talkie Equipment Co.Ltd., Stamp duty chargeable on Art. 40(a)Sch.I	63-66
15	12522 31-12-48	Question whether ~~mark~~ cash memo. is receipt and whether the offence under sec. 62(1)(b) is only on demand. (sets. 2(23) and 62(1)(b))	67-68

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Copies of Government of India, Ministry of Finance (Revenue Division) letter C, No. 39-stamps/46, dated the 26th December 1947.

Subject:- Affidavit filed by heir to the deceased for purposes of securing continuity of appeal regarding payment of pension- Liability to stamp duty-Item 4 (c) of Schedule I to the Indian ~~Act~~ Stamp Act, 1899.

"please refer to the correspondence resting with your memorandum No. 13013/F, dated the 20th November 1947.

As all the Provincial Governments are agreed that the affidevits in question are exempt from duty under exemption (c) to item 4 of Schedule I to the Indian Stamp Act, 1899, the Government of India have advised the Pensions Appeal Tribunals accordingly".

No. 1589-L/45-1629,
Revenue Department,
Bombay Castle, 14th
January 1948.

Copies forwarded for information to :-

The Commissioners of Divisions,

All Collectors (including the Collector of Bombay)

The Inspector General of Registration,

The Superintendent of Stamps,

The Accountant General,

All other Heads of Departments under several departments of the Secretariat,

All Departments of the Secretariat (except the Separate Department),

The Director of Publicity,

By order of the Governor of Bombay,

Sd/- B. T. Nayak,

Assistant Secretary to the Government of Bombay Revenue Department.

Statement of the Case.

The Famous Pictures Ltd., requested Messrs. Shamji Kalidas and Co., the financiers, the advance them a sum of Rs. 2 lacs, its repayment being secured to the financiers on the terms and conditions stated in the agreement, dated the 27th September 1946. The Company has agreed to keep by way of deposit the negative and sound films "Nargis" and "Mohan" with prints and positive copies thereof already prepared and to be prepared as trustees on behalf of the Financiers and to hand over the same to the Financiers or to their nominees. By clause 3 of the document, the Company agrees to hold the film and the publicity materials thereof for and on behalf of the Financiers and always at the disposal of the Financiers and to hand over the same to the Financiers or their nominees whenever required. By Clause 7, the Company agrees to assign absolutely by way of first legal mortgage to the Financiers subject to the proviso for redemption all the right, title and interest in the films together with the benefit and advantage thereof and also agrees to hypothecate and mortgage the pictures together with the full benefit and advantage of the performing rights and right of distribution, exploitation and exhibition thereof and also together with the full benefit and advantage of all contracts including contracts with technicians in respect of the picture "Mohan" and also together with all accounts and book-debts which are now in existence or which may hereafter come into existence. All the items such as right, title, interest, property, claim, demand whatsoever are referred to in the document as "Premises charged." By Clause 8(c) and

(d) the Company has to deposit the positive copies of the pictures in a safe place with the approval and in the name of the Financiers, who will have absolute control over the same and the negatives thereof are to be taken with the consent of the Financiers only. The Company are to take steps to see that no execution proceedings are taken in respect of the premises charged and to carry out all other obligations in respect of the premises charged so that the security may not be affected in any way. Company in respect of the Premises charged is to be handed over immediately to the Financiers. Until the same is done the amount so received is to be held by the Company for and on behalf of and as Trustees of the Financiers.

3. The Collector and the Superintendent of Stamps, Bombay, is of the opinion -- "The document is not a simple agreement to mortgage as a right over and in respect of specified property has been created to secure repayment of the sum of Rs five lacs. It falls within the definition of 'Mortgage' (Section 2(1) of the Indian Stamp Act, 1899). The security includes both tangible and intangible things. As intangible things, such as the benefit of contracts, book debts and other rights, have been given as security, the document is not a deed of hypothecation. It is a mortgage of moveables liable to duty under Article 40 of the Schedule to the Indian Stamp Act, 1899,. Though actual possession of the secured property is not given it is agreed

to be given by clauses 3, 7 and 8 of the document. When possession of the property is agreed to be given the document becomes liable to duty as a mortgage with possession under Article 40(a)". He therefore holds the document as chargeable with duty as under:-

Mortgage for Rs. 500,000/-. Article 40(a)	Rs. 7.500/-
50 % surcharge according to Bombay Act No.XIV of 1943.	Rs. 3,750/-
	Rs.11,250/-

The deficient duty of Rs. 11,248-8-0 and a penalty of Re. one thousand was demanded from Messrs. Motichand and Devidas, Solicitors for the Famous Pictures, Limited.

4. Messrs. Motichand and Devidas, Solicitors of the Famous Pictures, Ltd., dispute the correctness of the Collector's order (A copy of their letter is at slip T). In paragraph 2 of their letter, the Solicitors contend that the operative part and clause 7 of the document when read together do not make the document a mortgage deed. It is only an agreement and an undertaking to create a mortgage. They argue that clause 7 would have been totally redundant and out of place if the legal mortgage had in fact been created. In paragraph 8 they argue that if the document is held as Mortgage it is a deed of hypothecation and would be exempt either under exemption (2) to Article 40 as a letter of phypothecation accompanying the Bills of Exchange or under item 47 of the Revenue Department Notification No. 4198/33 dated 8th January 1941, reducing or remitting duty. In paragraphs 9 and 10 they contend that as the moneys have been secured by means Hundis, the document which provides that the borrower will execute a legal mortgage will be an additional security and would be entitled to the

reduction of duty. In paragraph 11 they contend that even if the document is taken to be an instrument of pawn or pledge it being unattested is not liable to stamp duty under the exemption to Article 6.

5. The superintendent of Stamps points out that the document is not a pledge, nor a deed of hypothecation and as the money were not secured on bills of exchange but on promissory notes payable otherwise than on demand, exemption (2) to Article 40 is not admissible. He further points out that the document ~~is~~ cannot be taken as a collateral security as there is no primary security stamped under Article 40, that since no immediate possession ~~is given the~~ is given the document is not a pawn or pledge and that the secuirty not being purely of goods it is not entitled to exemption under Article 6 of the Schedule to the Indian Stamp Act, 1899.

6. On a reference under section 56(2) of the Indian Stamp Act, 1899, the Superintendent of Stamps Bombay agreed with the view taken by the Collector but as several such documents are being stamped by the parties themselves with a stamp of Rs. 1-8-0 each under Article 5(c) as agreements and as a very large amount of revenue is involved in these cases, he has requested that the opinion of the Advocate General, Bombay, should be obtained in the matter. Accordingly the Advocate General is requested to favour Government with his opinion in the case.

Id/- P.M.L.
19-4

Remembrancer of Legal Affairs.

W.R. to the Advocate General, Bombay, No. 4015, dated the 19th April 1947.

No. 11 of 1948.

Advocate General's Chambers,
High Court,
Bombay, 20th January 1948.

U.O.R. to the Advocate General of Bombay,
No. 4015, dated the 19th of April 1947.

O P I N I O N.

The document in question is executed in consideratio of the loan of Rs. 5,00,000/- advanced by the financier, and the object is that the loan should be secured. The question is whether there is in the document only a contract tocreate a security in future as contended by Famous Pictures or whether there is a security actually created by the deed.

Clause 7 by itself contains only the agreement to execute in future a proper deed of mortgage or charge, and there are no express words anywhere else to the effect that the borrowers by this document itself created a charge or mortgage. The definition, however, of "mortgage" in the Stamp Act is a very wide one, much wider than that under section 58 of the Transfer of Property Act, firstly because the former comprises moveable property as well as immoveable, and secondly because it includes the creation of any right over or in specified property. The letter of Messrs. Motichand and Devidas appears to ignore the Stamp Act definition.

To my mind the material portion of the deed is that by which the borrowers agreed to hold the property in trust for the lenders. Clause 3 coupled with clauses 8(b) and (c) have the effect of creating interest in "premises charged in favour of the lenders". This constitutes the deed a mortgage deed liable to be stamped under Article 48. (See I.L.R. 39 Madras, 346). This case further says that a solemn deed of formal

nature cannot be a letter of hypothecation . I agree with that view. Consequently the exemption in Article 42 cannot apply. In any event it is accompanied not by a bill of exchange but a promissory note.

It is not a pawn or a pledge as there is no immediate possession given. The exemption under Article 47 of the Bombay Notification No.4298/33 of the 8th of January 1941 is not applicable as the document is not a mere agreement relating to hypothecation, but creates an interest in property within the meaning of the Stamp Act. There is, I think, no substance in the contention that legal mortgage will be an additional security because there are also hundis and promissory notes passed by the debtors. The hundies are, not in that sense, security such that the mortgage can be treated as an additional security, and so liable to a lesser duty. I agree with the view taken by the Superintendent of Stamps, and in my opinion the document is liable to be stamped as indicated, ~~is~~ by me.

Sd/- C. K. Daphtary.

Advocate General.

No. 959

Office of the

Remembrancer of Legal Affairs.

Bombay Castle, 28th January 1948.

To

The Superintendent of Stamps, Bombay.

Subject:- Stamp duty on agreement to Finance dated 27-9-46. The Famous Pictures Ltd., and Messrs. Shamji Kalidas and Co.

Sir,

With reference to your letter No. 2034/S, dated th 11th March 1947, on the above subject, I have the honour to forward herewith a copy of the opinion of the Advocate General, Bombay in the matter.

2. The document and the letter of the Solicitors accompany.

Id/- P.M.L.
28-1

Remembrancer of Legal Affairs.

PSM. 30-5
4C

Office of the R.L.A.

Forwarded to the Advocate General, Bombay.

2. The attention of the Advocate General, Bombay, is invited to the Advocate General's opinion No. 39 of 1934 and the decision of the Allahabad High Court reported in A.I.R.(1947) All 190 = I.L.R. 1947 All 7 and he is requested to advise whether the Superintendent of Stamps should still follow the opinion of the Advocate General given in 1934.

Id/- P.M.L.
28-1

Remembrancer of Legal Affairs.

U.R. to the Advocate General, Bombay, No. 1028, dated the 30th January 1948.

P8M. 20-5
4C

No. 13 of 1948.

Advocate General's Chambers,

High Court,

Bombay, 9th February, 1948.

U.O.R. to the Advocate General of Bombay,

No. 1028, dated the 30th January 1948.

O P I N I O N.

The Allahabad judgment in I.L.R., 1947, Allahabad, p. 7, gives no reasons and refers to no cases. In my opinion, the judgment is unsatisfactory and also erroneous. The Stamp Office should follow the opinion of the Advocate General, dated the 15th of September 1934, at page 211 of the File.

Sd/- C.K. Daphtary.

Advocate General.

PSM. 30-5
40

No. 1546.

Office of the

Remembrancer of Legal Affairs.

Bombay Castle, 13th February 1948.

To

The Superintendent of Stamps
Bombay.

Subject:- Agency Agreements Security Deposits
Cash and marketable security.

Sir,

With reference to your letter No. 11065/S, dated the 5th December 1947, on the subject noted above, I have the honour to forward herewith a copy of the opinion of the opinion of the Advocate General, Bombay who was consulted in the matter.

Your obedient servant,

Id/- R.T.K.

For Remembrancer of Legal Affairs.

PSM. 30-5
40

No. 1884.
Office of the
Remembrancer of Legal Affairs.
Bombay Castle, 25th February 1948.

To

The Superintendent of Stamps,
Bombay.

Subject:- Adjudication of stamp duty on a Memorandum sent by a Broker to his Principal dated 19-3-1947.

Sir,

With reference to your letter No. 8877/S dated the 17th October 1947, on the subject noted above. I have the honour to observe as follows:-

"An act which imposes a tax or charge upon the subject cannot be extended by implication and if there is ambiguity the construction must be in favour of the subject (Mulla's Stamp Act, 1941 Edition pp. 3-5). The Exemption under Art, 43 is not restricted to entries in a clearing list kept in accordance with the rules framed under the Bombay Securities Contract Control Act, 1925 but embraces all rules framed by a recognised Stock Exchange. The present case is fully covered by the exemption under Art, 43 and it is not possible to resort to the definition of the term "clearing List" in Art. 20A which is intended only for the purpose of that Article, to expand the operation of duty."

The copy of the Rules of the Native Share and Stock Brokers' Association received with your letter under reference is enclosed.

Your obedient servant,

Id/- P.M.L.
20-2

Remembrancer of Legal Affairs.

PSM. 30-5
$4C

Allowance for spoiled or misused stamps is made under the combined provisions of sections 49, 50, 52 and 53 of the Indian Stamp Act. It has been correctly stated at page 139 of Mulla & Pratt's Indian Stamp Act, 4th Edition, that the applicant for the allowance must be the person who purchased the stamp or his agent. It is not quite clear from the papers whether a solicitor purchases the stamps in his own name or in the name of a disclosed client and as his agent. If the stamps are purchased by the solicitor himself, he would naturally be entitled to apply in his own capacity as principal, and there is no reason in law for making a distinction between him and any other purchaser. It is also doubtful whether in law a solicitor would be entitled to pass on to his clients the deduction of one anna for each rupee under clause (c) of section 53, if that be the only made of allowance sanctioned in his case; since the spoiling or misuse arises out of his inadvertence, mistake or neglect. There is no evidence to show that a solicitor makes any profit by using for other clients stamps obtained in lieu of spoiled or misused stamps. Nor can the solicitor be said to make a profit of one anna per rupee unless it is proved that that deduction is to be borne by the client and has been appropriated by the solicitor. It appears that the Provincial Governments of U.P. and C.P. have made rules under section 74 whereby they allow pleaders to buy stamps for their business, to use them when occasion requires and to charge the price in their client's bill of costs. Such purchase and use would not then be in contravention of section 69. On the whole, I am of opinion that the gain to Government would be negligble, ~~while~~, while, on the other hand, the inconvenience to the public, who depend upon solicitors for conveyancing in Bombay, would be real. It is a matter for consideration, therefore, whether instructions of

the kind contemplated by the R.D., should be issued. In any case I would advise that, before instructions are issued, the opinion of the Bombay Incorporated Law Society, High Court, Bombay, should be obtained.

Id/-P.M.L.
28-4

Remembrancer of Legal Affairs.

U.R. to R.D.,No. 4143, dated the 29th April 1948.

PSM. 30-5
4C

Office of the R.L.A.

It appears from the complaint of Mr. Ranade of Parner that difficulties are being encountered in the various legal and other formalities required to be undergone for obtaining duplicate copies of shares, Government securities etc. by those who have lost them during the recent disturbances following the assassination of Mahatma Gandhi and he has requested Government to direct all the Companies concerned to give duplicate copies of share certificate on indemnity bonds bearing a stamp of Rs. 1-8-0 only to the persons who have lost them. The Superintendent of Stamps, who was consulted by Government, opines that letters of indemnity for obtaining duplicate copies of shares etc. are normally chargeable with the duty of Rs. 1-8-0 under Art. 5(c) of the Schedule to the Indian Stamp Act. Government proposes to issue a press note at p. 11 ante to the effect that according to law an indemnity letter with Rs. 1-8-0 stamp duty should serve the purpose in the ordinary course and Government would, therefore, advise the public to obtain duplicate copies of shares, dividend warrants, policies of insurance etc. from the respective companies on furnishing them with letters of indemnity on a stamp paper of Rs. 1-8-0 only and the companies are requested not to insist on letters of indemnity on a stamp paper of the higher denomination than is required by law. The R.L.A. is requested to examine the draft of the press note.

2. According to the Superintendent of Stamps, letters of indemnity would fall under Art. 5 cl. (c) of Schedule I to the Indian Stamp Act. An indemnity bond is liable under Art. 34 to the same duty as a security bond. The distinction between an agreement

of indemnity falling under Art. 5 clause (c) and an indemnity bond falling under Art. 34 (old Art. 28) Schedule I to the Indian Stamp Act was considered by the Full Bench of the Bombay High Court in 5 Bom. 478 and it was pointed out that the distinction turned upon the fact whether the executants obliged themselves to pay money to another. "What the executants, by the indemnity note, contract to do is, 'to hold the State Railway, its agents and servants, harmless and indemnified in respect of all claims to the said goods delivered to the principal executant' This might be done in various ways beside by the payment of Money". (Per Westropp C.J.).

3. Section 21 of the Indian Securities Act, 1920, provides for issuing a duplicate or renewing securities or convert, consolidating or sub-dividing a security or securities upon the applicant giving the prescribed indemnity against the claim of all persons claiming under the original security or under the security or securities so renewed, converted, consolidated or sub-divided, as the case may be. "Prescribed indemnity" means indemnity prescribed by Rules. Rule 22 of the Bombay Government Security Rules 1921 provides that an indemnity bond taken on the issue of a renewed, converted, consolidated or sub-divided security shall be, as nearly as may be, in form IX, and shall be for twice the amount of the security or securities, as the case may be, with two sureties. Form IX requires the executants to be held and firmly bound in the sum of rupees etc. It is, therefore, apparent that an indemnity bond taken under rule 22 read with section 21 of the Indian Securities Act would fall under Art. 34 of Schedule I to the Indian Stamp Act as the mode of indemnity prescribed would be by payment of money.

4. Regulation 7 in Table 'A' of the First Schedule to the Indian Companies Act which in the absence of proof to the contrary must be taken to have been incorporated in the articles of association provides "If a shar certificate, defaced, lost or destroyed, it may be renewed on payment of such fee, if any, not exceeding eight annas and on such terms, if, any, as to evidence and indemnity as the Directors think fit". Under this provision a new certificate in lieu of the old one can be issued on an indemnity being furnished. It was held by Buckland J. in 'Dulichand Vs. Dunkar Mills Co.'(A.I.R. XXXXXXX.1927 cal. 947) that this clause gave an absolute discretion to the Director as to the indemnity to be furnished with which the Court would not interfere. It would be difficult to say whether a Company would be satisfied with a mere letter of indemnity or would demand an indemnity bond specifying the amount in respect of which the Company could claim indemnity. Ordinarily the company would require an indemnity bond before it could agree to issue a new certificate of shares; for, it would, be in its own interest to require a sufficient security before it could take the risk of issuing a new certificate. When Government itself requires an indemnity bond afor renewing Government securities, it would not seem quite fair to the Companies to ask them to be content with mere letter of indemnity instead of an indemnity bond so tat they might at the most demand the surrender of the new certificate. It might be useful to collect information as to the current practice of companies in this matter. If the practice be to demand indemnity bonds, it is a question for Government's consideration whether they should be asked and can be persuaded to accept only

a letter of indemnity in the face of Government's own practice of demanding an indemnity bond.

Id/- P.M.L.
9-7

Remembrancer of Legal Affairs.

U.R. to R.D.,No. 6482, dated the 10th July 1948.

PSM. 30-5
40

Office of the R.L.A.

The Indian Stamp Act, 1899, Section 2(24) Art. 58-A(ii).

The Deed is a settlement chargeable under Article 58-A(ii) in the First Schedule to the Indian Stamp Act, 1899.

The contention of the petitioner that Deed is a Declaration of Trust is based presumably on the recital in the Deed that the property originally belonged to the Settlor's brother and the said brother deceased brother of the Settlor had expressed a desire before him that the property should be used for the various charitable purposes. In order to make the Deed chargeable as a Declaration of Trust the Disposition by the deceased brother should have been in writing e.g. by a will. There has been no disposition until the Deed was executed. The Deed clearly falls within the definition of the term "Settlement" as appearing in section 2(24) of the Stamp Act.

The Deed contains an obligation on the part of the Trustees to pay an annual sum of Rs. 300/- for life and this obligation is in the nature of trust and not of an annuity charged on the property The obligation creates a trust for payment of Rs. 300/- to the Settlor for life and hence the Deed does not fall under Article 58-A(i).

Id/- P.M.L.
24-8

Remembrancer of Legal Affairs.

U.R. to R.D.,No. 8164, dated the 25th August 1948.

PSM. 30-5
4C

Office of the R.L.A.

Statement of the Case.

The Alembic Distributors Ltd. executed on 31-12-1945 an indenture of floating charge on its undertaking and all its present and future properties in favour of the Alembic Chemical Works Coy. Ltd, for Rs. 10,00,000. The said document is stamped with a stamp of Rs. 15 (although it was chargeable as mortgage under Article 40(b) of Schedule I to the Indian Stamp Act for Rs. 11250/-) and a copy of the same was filed with the Registrar of Companies under the same was filed with the Registrar of Companies under section 109 of the Indian Companies Act, 1913. The Registrar stated that in view of the Advocate General's opinion he could not question as to whether the original was duly stamped or not but as Government was deprived of proper stamp duty the papers were referred to Government. The Superintendent of Stamps, Bombay, agreed with the Advocate General that no action is possible in such cases for want of provision in the Stamp Act empowering the Collector or a punlic officer to enforce production of the original document. On a reference to the R.L.A. the R?L.A. in his opinion No. 6950, dated 14-10-1946 suggested two courses for the recovery of the deficit duty. One of them was to call for the indenture of floating charge, to recover the amount of the Stamp dut and the penalty thereon and then to prosecute the offenders under section 43.

According the document was called for inspection which bore stamps of Rs. 15/- and was found to be understamped to the extent of Rs. 11,235/-. The Superintendent of Stamp found that though the document was in his possession there was in his possession there was no provision under qhich the duty and penalt

could be recovered inxxx view of the R.L.A.'s opinion No. 5910, dated 1-9-1943; and the other alternative under section 40 was not available as the document was not previously impounded under section 33. When this fact was brought to the R.L.A.'s notice the R.L.A. consulted the P.P. for Bombay who took the view (Pl. see P.P.'s letter No. 498, dated 10th March 1947), that it was not possible to impound the document but the Collector may institute proceedings under section 62(b) or section 64 of the Indian Stamp Act and request the Court to issue summons for the production of the original document. The P.P. further suggested that it would be possible that on the Collector pointing out the underpayment of the duty the company might pay the difference. Steps were taken by the Collector accordingly and the Co. was informed of the understamping. Messrs. Amin, Desai & Nanavati, Solicitors argued on behalf of the Co. that the document was not a deed of mortgage but was chargeable under Article 57 of the Schedule to the Act. The Solicitors also took the opinion of the Advocate General Bombay, on 16-12-1947, where he held as follows:-

"In my opinion, this is not a mortgage within the meaning of section 2(17), which states an essential element of a mortgage deed, the creation of a right over specific property. Indeed the property covered thereby is not capable of being specified, since the very transaction contemplates that the property will change from time to time and may do so from day to day. Article 40 applies to a mortgage deed and refers back to the definition under section 2(17). The Article therefore does not apply to a floating charge. Article 6(2) also, in my opinion, is not applicable as it refers to a deposite or pledge. This in the first place contemplates that the property has to be in the possession of the pledge or

pawnee, and secondly that it must be also specified property. If either of these conditions is not fulfilled, that article will not apply. The pledge is, as pointed out, a bailment and transfers possession to the bailee. It is not necessary to deal then with the notification reducing the duty under Article 6. The notification uses the expression "hypothecation", but there again, hypothecation must be of specific property.

To my mind the Article which applies is Article 57. The agents have been appointed to the office of selling agents of the company, and the floating charge has been executed by way of security to account for money or property received by them by virtue of such appointment. In my opinion every term of the Article applies to the circumstances and to the documents and the recitals support my reading of the transaction. I should add that Article 15 cannot apply because there is no covenant in the documents whereby the agents obliged themselves to pay any money.

I think the document has been correctly stamped Article 57".

It appears that in 1938 the question of a floating charge in a mortgage was fully discussed and Mr. M.C.Setalvad, the then Advocate General in his opinion No. 17 of 1938 observed:

"A floating security is not a specific mortgage of the assets, plus a license to the mortgagor, to dispose of them in the course of his business, but is a floating mortgage applying to every item comprised in the security, but not specifically affecting any item until some event occurs or some act on the part of the mortgagee is done which causes it to crystalize into a fixed

security". (1910 2 K.B. 979 at p. 999) , there is. therefore, even in a floating charge a mortgage applying to every item comprised in the security All goods coming to the shop would be subject to the mortgage, and in my opinion, there would be a security created in respect of specified property. In any event, the definition in section 2(17) of the Stamp Act is an inclusive definition, and would not prevent even mortgage deeds other than those in respect of specified property being regarded as mortgage deeds within the meaning of the Stamp Act".

The Superintendent of Stamps states that the opinion of the Advocate General obtained by Messrs. Amin, Desai and Nanavati conflicts with the opinion No. 17 of 1938 and as no opportunity was given to him to place the Government's point of view before the Advocate General it is for consideration whether the opinion should be accepted and the prosecution of the Company dropped. The question is not quite free from doubt and before sanctions prosecution it would be necessary for Government to be fortified with the opinion of t e Advocate General. He is therefore requested to be so good as to give his opinion in the matter as early as possible.

Id/- P.H.L.
2-7

Remembrancer of Legal Affairs.

U.R. to the Advocate General, Bombay, No. 6238, dated the 3rd July 1948.

PSH. 30-5
4C

No. 38 of 1948.

ADVOCATE GENERAL's CHAMBERS,
HIGH COURT,
Bombay, 30th August 1948

U.O.R. TO THE ADVOCATE GENERAL OF BOM AY, No. 6238 dated the 3rd July 1948.

OPINION.

I am in general agreement with the opinion given by Mr. C.K.Daphtary, the Advocate General of Bombay, on the 16th December 1947. In my opinion the document passed by the Alembic Distributors Limited (the Agents) in favour of the Alembic Chemical Works Co., by which the Agents agreed to give a floating charge on their undertaking and present and future properties book debts etc. is not a mortgage within the meaning of section 2(17) of the Indian Stamp Act, (II of 1899). In order to be a Mortgage Deed within the meaning of that Section (a right over or in respect of Specified property) should be created. It cannot be said that by the document ,a right is created over or in respect of specified property.

In my opinion the document falls within Article 57 of the Stamp Act, as the same is executed by way of security for due execution of an office (as agents) and to account for money or other property received by or virtue of such office.

The observations in the case of Evans Vs. Rival Granitte Quarries, Limited, reported in (1910) 2, K.B. 979, relied on by Mr. M.C.Setalvad, the Advocate General of Bombay, in is Opinion dated 3rd March 1939, (No. 17 of 1939) are to my mind not applicable to the point in question. The observations in that case referred to a question as to priority between a debenture holder and an execution creditor. It was in

that connection that Buckley L.J. observed at page 999 as follows:-

"A floating security is not a future security; it is a present security, which presently affects all the assests of the Company, expressed to be included in it. On the other hand, it is not a specific security: the holder cannot affirm that the assests are specifically mortgaged to him. The assests are mortgaged in such a way that the Mortgagor can deal with them without the concurrence of the Mortgagee".

In the present case, the question has to be considered from the point of view of the Stamp Act and in as much as the property covered by the document is not Specific property does not fall within section 2, Sub-Section 17. The document falls within Article 57 of the Stamp Act.

Sd/- M.P.Amin.

Ag. Advocate General.

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Office of the R.L.A.

The Advocate General, Bombay, who was consulted in the matter is in general agreement with the opinion Given by Mr. C.K.Daphtary. A copy of his opinion is forwarded to the Revenue Department.

Id/- P.M.L.
1-9
Remembrancer of Legal Affairs.

U.R. to R.D.,No. 8435, dated the 2nd September, 1948.

PSM. 30-5
4C

Indian Stamp Act, 1899. Article 45. Duty as an instrument of partition and not release.

From one of the recitals it appears that in 1925 there was a partition which was partial as to property. By the present instrument the parties proposed to deal with the properties which had then "remained undistributed".

This recital is clear evidence to show that the parties intended to sever and their joint family status was put an end to in 1925 and accordingly with regard to the properties which "remained undistributed" the presumption would be that the parties held it as tenants-in-common unless a special agreement to hold it as joint tenants is proved. (Mulla's Hindu Law, 9th edition, p. 401).

Since the parties are tenants-in-common their interests are quite distinct and what is sought to be done now is the transfer of that distinct interest and not mere relinquishment of a claim.

The instrument is not a release but an instrument of partition and is chargeable under Article 45 in the first Schedule to the Indian Stamp Act, 1899.

Id/- P.M.L.
28-10

Remembrancer of Legal Affairs.

U.R. to R.D.,No. 10147, dated the 29th October 1948.

PSM. 30-5
4C

Under the Indian Stamp Act, 1899, duty is on the instrument and not on the transaction.

In view of the circumstances stated by the Superintendent of Stamps, Bombay, the R.D. considers that it would be better to ask the Superintendent of Stamps to obtain affidavits from the parties concerned embodying all the facts reported by them and to impound the document permanently. The R.L.A. is requested to advise.

The Superintendent of Stamps, inter alia states that "the Solicitors admitted that the terms of the document go far beyond the intention of the parties, but they state that the parties never intended to execute the document containing the wide powers." This view is sought to be sup orted by urging certain grounds, one of which is that "no mortgage, charge, pledge or other security whatsoever was ever intended to be created by the parties by the said agreement."

As regards the above contentions of the Solicitors, it may be stated that the application of the Stamp Act to particular instruments is governed by two fundamental principles, namely:-

(1) The Court is not bound by the apparent tenor of the instrument, but will decide according to the real nature or substance of the transaction, and

(2) the duty is on the instrument, not on the transaction (vide p. 5 of Mulla's Stamp Act).

In Re-Burma Shell Oil Storage and Distribution Co., 55 All 87[illegible], as instrument purporting to be a license was in fact a lease and was chargeable as a lease, Sulaiman J. said "we have to look at the substance of the terms agreed upon and not to the nomenclature given to the

the deed by the parties".

Condition 2 of the Agreement provides thus:-

"By way of security for repayment of the said sum of Rs. 4,00,000/- only advanced to the Borrowers by the Lenders and interest and other money payable under these presents as aforesaid, the Borrowers do hereby in the meantime hypothecate in favour of the Lenders all t at the said film "Azadi-ke-Rahper" etc.,--- subject neverthless to the right of the Borrowers to redeem on payment by the Borrowers to the Lenders of the amount due under the said nine Hundies Etc." Attention is also invited to conditions 5, 7(e),7(j) and 8. The material by which portion of the document is contained in condition 5 by which the Borrowers agreed to hold the film as express trustees for the Lenders. This has the effect of creating interest in the "premises hypothecated" and would constitute the deed of mortgage liable to be stamped under Art. 40(cf. Advocate General No. 11 dated 20-1-1948).

The document is duly executed by the parties and it is immaterial whether the document does not truly represent the intention of the parties. (R.L.A.'s No. 4232 dated 8-6-46). As the duty is on the instrument, the instrument is chargeable although the transaction it purports to record may not have been carried out. It is well settled that the stamp duty payable upon an instrument must be determined by refering to the terms of the instrument and that the Court is not entitled to take into consideration evidence dehors the instrument itself (vide p. 7 of Mulla's Stamp Act,) Consequently, the Borrowers will have to pay the definit stamp duty along with penalty.

Id/- P.M.L.
28-10
Remembrancer of Legal Affairs.

Office of the R.L.A.

Stamp duty on declaration made before the District Magistrate.

Schedule I, Art. 4 of the Indian Stamp Act, 1899.

It appears that in their memorandum No. F.23(91)-P/47 dated the 20th August 1948 the Government of India advised that non-Muslims who belonged to places in Pakistan and have migrated to India and desire to be treated as belonging to India while applying for passport should be required to complete a declaration in the form enclosed. A copy of the form is at p. 9 ante. This form is to be solemnly declared by a person before a District Magistrate and is required to bear the seal of that officer. In the aforesaid memorandum the Government of India first advised that the declaration should be on a stamp paper the value of which should be determined in accordance with law locally inforce. In pursuance of that direction, the Solicitor in the Legal Department was consulted and he opined that the declaration was chargeable with a stamp duty of Rs. 3 under Article 4 of the Schedule I to the Indian Stamp Act, 1899,. In the meanwhile, the Government of India again addressed this Government in the matter observing as follows:-

> "The Government of India have been advised that since the declaration in question is not required or authorised to be made under law, it is not liable to be stamped under Article 4 of Schedule I to the Indian Stamp Act, 1899. Different laws; hence the payment of stamp duty depends upon the stamp law of the Province concerned. If, therefore, according to the law locally in force, no stamp is required on such declaration, it need not be stamped."

On receipt of this communication from the Government of India the Solicitor in the Legal Department was again consulted and in his opinion No. 10010 dated 26th October 1948 the Solicitor advised as follows:

> "The formality of having the declaration in the presence of the District Magistrate who has in addition to his signature also to affix his seal thereto shows that the declaration is a declaration in lieu of an affidavit and as such liable to stamp duty under Article 4 in the first Schedule to the Indian Stamp Act, 1899, particularly as thedeclarants would in most cases be persons who by law are allowed to affirm or declare instead of swering. There is nothing in that Article which requires that such declaration should be required or authorised by any law. If thedeclaration is intended to be a mere declaration, the formality of having the same made in the presence of a magistrate may have to be dispensed with".

In view of the fact that the Solicitor in the Legal Department desired that the R.L.A. should be consulted the papers are referred to him for opinion.

2. Article 4 in the Schedule I to the Indian Stamp Act applies to affidavits, including affirmation or declaration in the cases of persons by law allowed to affirm or declare instead of swering. This Article does not provide that the affirmation or declaration must have been made under or authorised by any law since all that it means is that the affirmation or declaration must have been made by a person by law allowed to affirm or declare instead of swering. The expression "a person by law allowed to affirm or

declare instead of swering" in Article 4 has reference to section 6 of the Indian Oaths Act , 1873 which allows affirmation to be made by persons objecting to oaths. But, for the purpose of ascertaining whether the writing is an affirmation or a declaration, a reference will have to be made to section 4, whereunder affirmation or declarations can be made before courts and persons authorised to administer by themselves or by an officer authorised to administer oaths and affirmations in the discharge of the duties or in exercise of the powers imposed or conferred upon them respectively by law. It is clear from this provision that a declaration to fall under section 4 must have been made on oath or affirmation (See R.L.A.'s opinion No. 6470 dated 17-8-1938). A declaration in the form prescribed by the Government of India in their memorandum dated the 20th August 1948 is not required to be made before District Magistrates authorised to administer oaths and affirmations in the discharge of the duties or in exercise of the powers imposed or conferred upon them respectively by law. Consequently the declaration in the form prescribed by the Govern ent of India would not be a declaration falling under section 4 of the Indian Oaths Act and, therefore, Article 4 in Schedule I to the Indian Stamp Act will not apply. The view taken by the Government of India is correct and no stamp duty would be leviable on such declaration.

Id/- P.M.L.
15-11

Remembrancer of Legal Affairs.

U.R. to Passport Office, No. 10753, dated the 16th November 1948

No. 12393.

Office of the

Remembrancer of Legal Affairs.

Bombay Castle, 29th December 1948.

To

The Superintendent of Stamps,
General Stamp Office,
Bombay.

Subject:- Hypothecation deed between Hind Bank and the International Talkie Equipment Co., Ltd.

Sir,

With reference to your letters Nos. 6149/5 and 6507/5 dated 22-7-48 and 3-8-48 respectively, I have the honour to forward herewith my opinion the above matter.

The hypothecation deed referred to above accompanies

Yours faithfully,

Id/- P.M.L.

Remembrancer of Legal Affairs.

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Office of the R.L.A.

Indian Stamp Act, 1899. Schedule I Art. 40(a).

Clause 10 of the instrument provides that on demand by the Bank the Borrowers shall pay the balance then due to the Bank with interest and clause 11 provides that the Bank and its officers and agents shall be entitled at any time to enter and remain at any place where the hypothecated goods may be and take possession of, recover and receive the same and sell or otherwise dispose of the same and apply the net sale proceeds in or towards the balance due to the Bank.

Although the provision to take or give possession has not been expressly made conditional or contingnent on default of the Borrowers or an other contingency, it would appear that read in its proper context, the provision is intended as a part of the Bank's power of sale and is to be exercised with a view to realising the security. As such it is a provision analogous to the one dealt with in 49 Mad. 903 and hence the instrument is not chargeable under Article 40(a) in the Schedule I to the Stamp Act.

Id/- P.M.L.

Remembrancer of Legal Affairs.

Officex of the R.L.A.

Indian Stamp Act. Section 2(23) & 62(1)(b).

Whether cash memo is receipt and whether the offence under section 62(1)(b) is only on demand.

A cash memo issued by the seller to his customer is not a receipt within the meaning of section 2(23) of the Stamp Act (cf. 12 Rang 174).

A person giving an unstamped receipt for a sum exceeding Rs. 20/- is liable to penalty prescribed by section 62(1)(b) although no demand has been made for a receipt (cf. R.L.A.'s opinion No. 122 dated 19-1-1955).

Sd/- P.M.L.
31-12

Remembrancer of Legal Affairs.

U.R. to R.D.,No. 12522, dated the 31st Dec. 1948.

PSM. 31-5
4C